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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES F. NORTON, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Fourth Amendment's "good faith" exception to the exclusionary rule applicable to a warrant that is so facially deficient that no reasonably well-trained officer could objectively presume it to be valid?

2. Where during an evidentiary "good faith" hearing the government offered no evidence and Petitioners' evidence affirmatively established that no reasonably well-trained officer could have objectively believed that facially deficient general warrants calling for the seizure of "all corporate records" were valid may the Court find that the executing officers acted in "good faith"?

3. Whether the jury verdict was coerced by the trial court's verdict-urging instruction which was given with knowledge of the numerical division of the jury as to guilt and acquittal and which pressured a dissenting juror into voting under duress?

PARTIES BEFORE THE COURT OF APPEALS

The parties before the Court of Appeals were appellants, Paul A. DiFranco, Paul A. Fosco, James F. Norton and James Pinckard, Petitioners herein. The United States of America was the sole appellee.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners James F. Norton, Paul A. DiFranco, Paul A. Fosco and James Pinckard respectfully pray that a writ of certiorari issue to review the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 867 F.2d 1354 and is Appendix 1 in the Appendix filed separately herewith. The District Court's order and findings, which were not reported, are Appendix 2 in the separate Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1989. This Petition for Certiorari was filed within sixty (60) days of said judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On October 6, 1976, a search of the administrative offices of Consultants & Administrators, Inc. ("C & A") and Pinckard and Associates ("P & A") was executed by Special FBI Agent James W. Wagner and sixteen other FBI Agents pursuant to warrants authorizing the seizure of

"all corporate records." (R.4-659-1; App. 53-56)[1], [2] Although Wagner submitted an affidavit to the issuing Magistrate in support of the warrants, the affidavit was sealed and impounded the day prior to the search and was neither incorporated into the warrant nor attached to it at the time of the search. (R.2-372-3; R.87-144)[3]

In all, the FBI seized eighteen cartons of materials from C & A documented in a nineteen-page inventory list. (R. 88-109) Virtually all of C & A's and P & A's records were seized. (R.87-144) (R.2-372-3)

On February 17, 1982, a hearing was held on defendants' joint motion to suppress limited to the question of whether the warrants were impermissibly general. In ordering suppression, District Judge James Kehoe ruled:

> If these warrants are upheld, the entire meaning and intent of the Fourth Amendment would be impaired as it pertains to particularly describing the items to be seized. Accordingly, it is this Court's considered judgment that the warrant is unconstitutionally general. (App.32)

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[1] References to the Record are preceded by the Prefix "R" and are followed by (1) volume number, (2) page number, and (3) document number (where applicable). References to the Appendix, filed separately herewith, are preceded by the abbreviation "App." and are followed by a page number.

[2] C & A was an Illinois corporation located in Chicago, Illinois, that contracted with various labor union health and welfare funds to provide dental and vision services to union members and their families. P & A was responsible for verifying the eligibility of persons receiving health services from C & A. At the time of the search in October, 1976, James F. Norton was President of C & A, Paul A. Fosco was a Vice-President, Dr. Paul A. DiFranco ran the dental center of the facility, and James Pinckard was President of P & A.

[3] The government conceded in the lower court that the affidavit could not provide particularity to the warrants. (R.16-17, 24-37)

However, the Court of Appeals for the Eleventh Circuit ordered a remand hearing on the subject of the Agent's "good faith" in light of this Court's opinion in *United States v. Leon*, 468 U.S. 897 (1984) ("*Leon*"). *United States v. Accardo*, 749 F.2d 1477 (11th Cir. 1985), *cert. denied*, 474 U.S. 949 (1985). (App.36)

Although it was the government's burden to prove "good faith," it offered no evidence at the hearing on remand. During the hearing, Special Agent James W. Wagner admitted that, at the time of the warrant's preparation and execution, based upon his professional training and instruction in search and seizure law, he *knew* that search warrants had to carefully identify and describe the items to be seized as clearly as possible in order to comply with the law. (R.75-41) Wagner further testified that, at the time of the search, the FBI Manual provided that there be *no* exploratory searches (a complete search of all of the areas in a confined space). (R.75-36, 37)

Wagner admitted that he was aware, prior to the execution of the warrants, that C & A was an actual dental and vision services clinic which in fact provided care to union members and their families (R.75-20), and that P & A, in fact, checked eligibility for C & A. (R.75-16) Wagner further testified that, prior to the drafting of his search affidavit, government informant Daniel G. Milano provided him with specific information as to the type of documents located at C & A and P & A and where within C & A's and P & A's offices those items could be found. (R.75-14) Nonetheless, Wagner drafted and obtained facially improper general warrants calling for the seizure of "all corporate records."

Professor G. Robert Blakey, the O'Neil Professor of Law at the University of Notre Dame, testified as an expert on the state of the law of "good faith" and the

Fourth Amendment. (R.75-50, 51)[4] Blakey testified that, based on the state of the law that existed on October 6, 1976, no reasonably well-trained officer could have objectively believed that the C & A or P & A warrants were valid:

> A well-trained police officer cognizant of the Fourth Amendment, its history and its interpretation would pick the warrant up and say, "I cannot get adequate guidance from the face of this warrant as to what I may seize and to what I may not seize." This, therefore, is a general warrant. (R.75-76)

Blakey testified that a reasonably well-trained officer in October, 1976 would be expected to generally know the major pronouncements of the Supreme Court such as the requirement of particularity in a search warrant whereby nothing could be left to the discretion of the officer. (R.75-57) He would also know that a search warrant for books and records and papers must be drafted with such

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[4] Blakey had lectured to and worked with law enforcement officers, including FBI Agents, for the most part of the last twenty years. (R.75-51) He graduated from Notre Dame Law School in 1960 and was thereafter employed in the Attorney General's Honors Program in the United States Department of Justice, assigned to the Organized Crime and Racketeering Department in the Criminal Division. He worked as a liaison between the Department and various federal agencies including the FBI. He also participated in designing, executing and defending searches and seizures for the FBI and IRS. He left the Department of Justice in 1964 to become Professor of Law at Notre Dame and taught there from 1964 to 1968. From 1972 to 1978, he was the director of Cornell University's Institute of Organized Crime. The Institute sponsored a summer program for prosecutors and police officers. U.S. Attorneys and FBI agents attended the program. In addition, Blakey lectured to the Sixth, Seventh, Fourth and Eleventh Circuits on Fourth Amendment issues and published articles on the Fourth Amendment. He returned to teach at Notre Dame in 1978 and has taught criminal law and procedure there ever since. (R.75-45-51)

particularity to minimize the search and seizure of non-designated books and papers. (R.75-63) In light of what a reasonably well-trained officer should have known in October, 1976, the fact that a U.S. Attorney approved the search affidavit or that the Magistrate issued the search warrant did not change the fact that an officer could not in objective good faith have relied on the C & A and P & A warrants. (R.66, 75-80)

At the end of the hearing, District Judge Kehoe remarked:

> I would have thought an eighth-grade civics student knew you cannot put out a general warrant, and I said from the first time I had this hearing; I say it again: I cannot even with the help of the professor, I can't think of anything to get more general, unless you went out and said, "Go in that house and take everything out of it." (R.75-105)

However, on February 13, 1986, Judge Kehoe denied petitioners' motion to suppress holding that the Eleventh Circuit in *Accardo, supra*, had *sub judice* determined that the warrants were not so facially deficient that the executing officers could not have reasonably presumed them to be valid. (App.23-25)

At Petitioners' subsequent trial, hundreds of documents were admitted over objection that were seized at C & A and P & A during execution of the general warrants and petitioners were found guilty.

In addition to the aforementioned search and good faith issues, this case also involved jury coercion. During the second day of jury deliberations, a juror wrote the trial judge a note. The juror informed the court that the other eleven jurors had voted to convict and that he dissented as he had reasonable doubts as to defendants' guilt. (App. 58; R.92-39). He asked if he could be excused and an alter-

nate juror substituted as he wanted "to avoid another lengthy and expensive trial" and disliked "having to have a hung jury." *Id.* He also asked if he must vote with the majority, "even under duress." *Id.*

The trial court refused to inquire of the juror as to the "duress" or whether further deliberations would be futile. (R.92-47, 48). Instead, the court summoned the dissenting juror and stated the following:

> THE COURT: Good morning, sir. Just have a seat.
>
> Sir, you sent me a note in which you asked two questions, in order to avoid another lengthy and expensive trial, would it be possible to surrender my Seat No. 8 to the No. 1 alternate juror to get a verdict in this case?
>
> That is your first question, and the answer is no.
>
> The second question is, must I vote with the majority even under duress, Your Honor? And the answer is absolutely, equivocally, [sic] no. (R.92-51).

Immediately thereafter, the trial court summoned the entire jury and reread to the jury an instruction which reminded them that their verdict "must be unanimous" and that they must decide the case for themselves, "but only after an impartial consideration of the evidence in the case with your fellow jurors." (App.57; R.92-51-53). Defense objections and motions for mistrial were noted throughout this process and were denied. (R.92-49, 53-55). In less than four hours, the jury notified the court that they had reached a verdict, the clerk of the court telephoned counsel who were away from the courthouse and the jury's verdict was read in court. Each defendant was found guilty.

On appeal, the Court of Appeals for the Eleventh Circuit affirmed the denial of Petitioners' motion to suppress. (App.1,7-9) In so holding, the Court failed to acknowledge

any of the precedent contained in Petitioners' brief demonstrating that three other Circuits had expressly found warrants such as those at issue here impermissibly general and so facially deficient as to necessarily be outside of *Leon*'s "good faith" exception.[5] The Court further ignored the evidence adduced at the "good faith" hearing where Agent Wagner admitted that he was aware of the Fourth Amendment's particularity requirement at the time of the warrants' issuance and also ignored Professor Blakey's testimony. Rather, the Court found that the "good faith" exception applied because the search affidavit was reviewed by prosecutors before its presentment to the Magistrate, and erroneously found Wagner's belief that he needed all of C & A's documents reasonable. (App.8-9)

In affirming Petitioners' convictions, the Eleventh Circuit also found that the trial court had not improperly coerced a verdict. The Court stated that although the numerical division as to guilt and acquittal was disclosed to the trial court, the supplemental instruction given was not comparable to an *Allen* charge and the jury deliberated a substantial period of time after the trial court's instruction. (App.21, *citing Allen v. United States*, 164 U.S. 492 (1896)) The Eleventh Circuit held that these factors, the lack of an *Allen* charge and the length of time between the supplemental instruction and the return of

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[5] *United States v. Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986); *United States v. Washington*, 797 F.2d 1461, 1472-74 (9th Cir. 1986); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985); *United States v. Fuccillo*, 808 F.2d 173, 178 (1st Cir. 1987), *cert. denied*, ___ U.S. ___, 107 S.Ct. 2481 (1987); *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988); and *United States v. Dozier*, 844 F.2d 701, 708 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 312 (1989).

verdict, underscored that there was no coercion. (App.21) The Court also dismissed any argument concerning "duress," stating that "the juror's note made clear that the pressure allegedly placed upon him [the dissenting juror] resulted from discussions between the jurors and not from extraneous prejudicial information." (App.22)

The Court's reasoning and decision on the jury coercion issue are in conflict with those of the Eighth and Ninth Circuit Courts of Appeals. Moreover, the right to an uncoerced verdict is a federal question of great importance which was recently addressed by the Supreme Court in *Lowenfield v. Phelps*, ____ U.S. ____, 108 S.Ct. 546 (1988). The Eleventh Circuit's rationale is in conflict with *Lowenfield* and the issue needs to be settled by the this Court. Certiorari is necessary to resolve the conflict between the Circuits.

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT'S DECISION THAT A FACIALLY DEFICIENT GENERAL WARRANT WHICH NO REASONABLY WELL-TRAINED OFFICER COULD OBJECTIVELY PRESUME VALID WAS WITHIN THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IS IN CONFLICT WITH THE DECISIONS OF THE FIRST, NINTH AND TENTH CIRCUITS AND WITH THIS COURT'S HOLDING IN *LEON*.

The Court of Appeals' decision that the "all corporate records" warrants in this case were not facially deficient as general warrants is in derogation of the Fourth Amendment, is in conflict with three other Courts of Appeal and

conflicts with this Court's decision in *Leon*. Certiorari is warranted to resolve these irreconcilable conflicts, create harmony and uniformity between the Circuits on vital Fourth Amendment issues, and give Petitioners a fair trial.[6]

The Court's opinion simply makes a mockery of the Fourth Amendment's prohibition against general warrants. Up until the Eleventh Circuit's decision, general warrants had been consistently condemned and invalidated by this Court and by the Courts of Appeals as well. *Andresen v. Maryland*, 427 U.S. 463 (1976); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *United States v. Abrams*, 615 F.2d 541, 544 (1st Cir. 1980); *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982); *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1980). This Court's decision in *Leon* did nothing to erode that prohibition.

The Eleventh Circuit's opinion is in conflict with the majority of the decisions of other Courts of Appeals which have considered general warrants such as those at issue here and have held them to be outside *Leon*'s "good faith" exception as a matter of law.[7] These decisions are all

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[6] To Petitioners' knowledge, this Court has not ruled on what constitutes "good faith" vis-a-vis general warrants under *Leon* since establishing that standard.

[7] *See, United States v. Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986) (warrant calling for seizure of "address books, notebook, notes, documents, records, assets, photographs and other items and paraphernalia" impermissibly general and outside *Leon*'s "good faith" exception since no well-trained officer could presume a general warrant to be valid); *Accord, United States v. Washington*, 797 F.2d 1461, 1472-74 (9th Cir. 1986) and *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985) (facially overbroad warrants may not be relied upon in good faith); *United States v. Fuccillo*, 808 F.2d 173, 178 (1st Cir. 1987), *cert. denied*, ____ U.S. ____, 107

(Footnote continued on following page)

based upon *Leon*'s express holding that the "good faith" exception is inapplicable to warrants that are so facially deficient in particularity that the executing officers cannot reasonably presume them to be valid. *Leon*, at 923.

Only two reported decisions hold to the contrary, *United States v. Buck*, 813 F.2d 588 (2d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 167 (1987) and *United States v. Diaz*, 841 F.2d 1 (1st Cir. 1988). *Buck* is premised on a finding that the Third Circuit had not "spelled out the particularity requirement" until 1987, which is simply illogical considering this Court's 1976 decision in *Andresen v. Maryland*, *supra*. Additionally, *Buck* is not applicable since the Seventh Circuit (Agent Wagner's jurisdiction and where the search was conducted) had expressly required particularity in warrants prior to the 1976 searches of C & A and P & A. *United States v. Hinton*, 219 F.2d 324, 326 (7th Cir. 1955); *United States v. Cook*, 432 F.2d 1093, 1104 (7th Cir. 1970).[8]

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[7] *continued*

S.Ct. 2481 (1987) (warrant calling for seizure of "stolen cartons of women's clothing" was impermissibly general and outside "good faith" exception); *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988) (warrant authorizing seizure of corporate documents and correspondence limited to purchase, sale and illegal exportation of materials in violation of Arms Export Control Act and Export Administrative Act was impermissibly general); and *United States v. Dozier*, 844 F.2d 701, 708 (9th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 312 (1989) (warrant calling for seizure of "all written records, financial statements, address books, . . . telephone books and bills" was necessarily outside *Leon*'s "good faith" exception).

[8] The *Buck* court admitted that its holding was in conflict with *United States v. Fuccillo*, *supra*, and *United States v. Crozier*, *supra*.

Although the court in *Diaz* upheld a general warrant under *Leon*, it excluded from that finding certain items called for in the warrant which were not supported by probable cause. 841 F.2d at 6. Even so, the First Circuit admitted that its decision was "a close case." *Id.* Indeed, there is now an internal conflict between the First Circuit's decisions in *Diaz* and *Fuccillo*. At the very least, the conflict between the Circuits on this point warrants that certiorari be granted to alleviate inconsistent holdings on the application of the "good faith" exception to facially general warrants.

Like the warrants held to be outside of *Leon*'s "good faith" exception in the cases above, the C & A and P & A warrants calling for the seizure of "all corporate records," a directive far more general than *any* of the above cases, gave the executing officers unbridled discretion to rummage through the belongings of both corporations and cart away whatever they wanted regardless of whether or not there was probable cause for the seizures, precisely the conduct condemned by this Court in *Andresen*. Contrary to the Eleventh Circuit's decision, as a matter of law, "good faith" cannot justify these sweepingly general and facially insufficient warrants. Reversal is required and a writ of certiorari should issue to resolve the incongruous conflict now existing between the Circuits and to grant petitioners a fair trial where the illegally seized evidence would be suppressed.

II.

THE EVIDENCE AT THE "GOOD FAITH" HEARING ESTABLISHED THAT NO REASONABLY WELL-TRAINED OFFICER COULD OBJECTIVELY RELY ON THE VALIDITY OF GENERAL WARRANTS CALLING FOR THE SEIZURE OF "ALL CORPORATE RECORDS," AND THE ELEVENTH CIRCUIT'S HOLDING TO THE CONTRARY IS IN CONFLICT WITH THIS COURT'S DECISION IN *LEON* AND WITH DECISIONS OF OTHER COURTS.

Although it was the government's burden to prove "good faith," the prosecution put on no evidence at the "good faith" hearing. Petitioners' evidence uncategorically established the utter lack of "good faith." The trial court, however, denied defendant's suppression motion stating that the holding in *Accardo* found "*sub judice*" that the warrants were within the "good faith" exception. (App. 23-24) The trial judge's ruling was not only contrary to the evidence adduced at the hearing, but was simply incompatible with the Court of Appeals' directive in *Accardo* to hold an evidentiary hearing and with his own finding that an eighth-grade civics student would have known that the warrants were impermissibly general. (R. 75-105) The Eleventh Circuit's opinion upholding the facially deficient general warrants under the guise of the "good faith" doctrine is in hopeless conflict with this Court's decision in *Leon* and with other circuits. Certiorari is mandated.

At the "good faith" hearing, the following evidence was presented which demonstrated the total lack of objective "good faith:" Agent Wagner admitted that, as a result of his professional training, he knew prior to the issuance of the warrants that, if property to be seized was not contraband, it must be carefully identified and described in the warrant as clearly as possible. (R.75-41) In addition,

prior to the drafting and execution of the warrants, government informant Daniel Milano, Jr. had provided Wagner with specific information regarding the types of documents present at C & A and P & A and where those documents were located. (R.75-14)[9] Rather than specifying these distinct categories of documents, Wagner drafted warrants authorizing seizure of "all corporate records."

Based upon Wagner's testimony alone, the "good faith" exception is inapplicable because Wagner, admittedly an officer trained in search and seizure law with knowledge of the particularity requirement of the Fourth Amendment, could not have reasonably believed a general warrant was valid when he had knowledge of the existence and location of the particular items to be seized.[10]

The testimony of Professor G. Robert Blakey further demonstrated the total absence of "good faith." Blakey testified that in 1976 a reasonably well-trained officer would know that search warrants must be drafted with such particularity as to preclude discretion on the part of the executing officers and minimize the risk of seizure of non-designated documents. (R.75-57, 63) The C & A and P & A warrants however constituted "generality with a vengeance." (R.75-65) Blakey stated that under *Leon*'s objective standard:

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[9] Through interviewing Milano, Wagner knew of particular and specific documents and records at C & A and P & A which he wanted to obtain, including contracts between C & A and other specific companies and union health and welfare funds, bank statements, canceled checks, eligibility sheets, accounting worksheets, sealed bids, expense accounts, payroll records and invoices. (R.75-14)

[10] Wagner further admitted that the FBI manual provided that exploratory searches, searches of all the areas within a confined space, were impermissible. (R.75-36, 37)

> A well-trained officer, cognizant of the Fourth Amendment, its history and its interpretation would pick the warrant up and say, 'I cannot get adequate guidance from the face of this warrant as to what I may seize and what I may not seize.' This, therefore, is a general warrant. (R.75-76)

This was particularly true since the Supreme Court decided *Andresen v. Maryland*, *supra*, in June, 1976, and any reasonably well-trained officer in October, 1976, would have been aware of its holding *requiring* particularity.[11] (R.75-63) Contrary to the Eleventh Circuit's holding, good faith is totally lacking here and the inapplicability of *Leon*'s "good faith" exception is manifest.

In *Leon*, this Court emphasized that suppression was not a valid deterrent unless used to curb police misconduct. *Leon*, at 918. In this case, the need for deterrence cries out.[12] Agent Wagner had full knowledge of specific documents located on the premises to be searched and could have drafted particularized warrants. However, despite and contrary to his training and knowledge, he opted to draft general warrants so agents could rummage through and remove everything under the warrants' authority. *See*, *United States v. Strand*, 761 F.2d 449, 457 (8th Cir. 1985) ("good faith" exception inapplicable where more particular description could have been provided in warrant).

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[11] The fact that a U.S. Attorney reviewed the search affidavit prior to its presentation to the Magistrate did not alter Blakey's opinion because the warrants were not fair on their faces and the facial invalidity would have been apparent to any reasonably well-trained officer. (R.75-81) Thus, Blakey testified, the officer should not have executed the warrants. *Id.*

[12] The trial Court found and the government agreed that probable cause did not exist to seize "all corporate records." (R.75-93; R.4-659-3; R.75-92)

Where a reasonably well-trained officer drafts a general warrant to get access to documents he could not get if burdened by the constitutional requirement of probable cause the need for deterrence is manifest. As the Court held in *United States v. Fuccillo, supra*:

> The modification known as the good faith exception . . . is grounded in an objective standard of reasonableness. As a result, an officer is required to have a "reasonable knowledge of what the law prohibits."

808 F.2d at 177, citing *Leon* at 920, n.20. Clearly, the government did not prove "good faith" in the District Court.

The Eleventh Circuit found, without any evidentiary basis, that "the agents took every step that could reasonably be expected of them" since Wagner submitted an affidavit in support of the warrants that was reviewed by two prosecutors before submission to the Magistrate. (App.8) The Court also found that because C & A was alleged to be involved in a fraudulent kickback scheme, Wagner's belief that he needed all of C & A's and P & A's records was reasonable.[13] (App.8-9) These findings are in blatant conflict with the record and with the decisions of other Circuits.

The Court's holding completely ignores the fact that the trial court expressly found that Wagner's search affidavit established that C & A and P & A both had legitimate business functions and therefore had records not subject to seizure by the government. (R.4-659-2,3) Moreover,

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[13] The Court's justification of "good faith" on the ground that the Agent "believed he needed all of" the records is akin to an "end justifies the means" rationale which should not be tolerated to deny Fourth Amendment rights.

Wagner verified this to be the case prior to execution of the warrants. (R.75-16, 20) Thus, any exception to the exclusionary rule premised on a "business permeated by fraud" theory is not applicable here. The so-called "all records" exception flowing from this theory is only applicable to cases where the *entire* business is nothing but a fraud such as in "boiler room" cases. *United States v. Bentley*, 825 F.2d 1104, 1110 (7th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 240 (1987). As the Court in *In Re Motion for Retention of Property Pursuant to Rule 41*, 681 F.Supp. 677, 681 (D. Hawaii 1988), held:

> The ultimate question, however, is whether an officer could in good faith believe that this case is similar to cases such as *50-State*[14] where facially broad warrants have been upheld. An attempt to create new law does not fall within the *Leon* exception. The Court finds that the facts in this case, as related by Inspector Partman in his affidavit, preclude reliance upon 50-State. Such reliance is at most wishful thinking on the part of the officer. There was no indication that [the business] was permeated with fraud in a manner similar to the boiler room operations where the all records doctrine has been applied. This obvious difference precludes the government from claiming that the executing officers relied in good faith upon the validity of the warrant.

681 F.Supp. at 686.[15]

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[14] *United States v. Offices Known as 50-State Distributing Company*, 708 F.2d 1371 (9th Cir.), *cert. denied*, 465 U.S. 1021 (1983) (a "boiler room" case).

[15] *See, also, Voss v. Bergsgaard*, 744 F.2d 402, 406 (10th Cir. 1985) (warrant authorizing seizure of "all" records, whether or not relevant to a specified crime, is insufficiently particular). *Accord, United States v. Bentley, supra*, at 1110 ("when probable cause covers fewer [than all] documents in a system of files, the warrant must be more confined and tell the officers how to separate the documents to be seized from the others").

In 1976 when the warrants were issued, as today, no case stood for the proposition that where part of a business is tainted by fraud, a general warrant may be employed to seize all of that company's books and records. Accordingly, the "all records" exception is unavailable to *create* "good faith" here.[16]

Thus, the Eleventh Circuit's opinion is in conflict with the decisions of this Court and the other Circuits in all aspects of its holding on Fourth Amendment issues. The evidence seized pursuant to these unlawful searches should have been suppressed. Because irreconcilable conflicts now exist between the Circuits as well as between the Eleventh Circuit's opinion and this Court's decision in *Leon* on vital Fourth Amendment issues including the "good faith" exception to the exclusionary rule and its application to facially deficient general warrants, certiorari is warranted.

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[16] The Court of Appeals also based its finding of "good faith" on the fact that the search affidavit was reviewed by prosecutors before presentation to a Magistrate. This fact however does not in the least show or suggest good faith because no assurances were given to Wagner that the warrant comported with the particularity requirement of the Fourth Amendment, and no limitations were placed on the warrant's scope. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). *See, United States v. Dozier, supra*, at 708 (review of impermissibly general warrant by a U.S. Attorney without limiting parameters of general search could not create good faith reliance on a facially deficient warrant).

III.

THE ELEVENTH CIRCUIT'S DECISION ON THE JURY COERCION ISSUE IS IN CONFLICT WITH THE DECISIONS OF THE EIGHTH AND NINTH CIRCUITS AND IS CONTRARY TO LAW.

The Eleventh Circuit characterized the juror's note as merely the thoughts of a juror who "entertained some doubt as to their [defendants'] guilt." (App.18) The content of the juror's note is more far-reaching. That communication specifically informed the trial court of the jury's numerical division as to guilt and acquittal; that the juror's conscience told him that he had "reasonable doubts" of defendants' guilt; that there would be a hung jury causing another lengthy and expensive trial to ensue unless he was allowed to surrender his seat; and that he questioned whether he was compelled to vote with the majority, "even under duress." (App.58) The trial court's solution to this situation was to answer the dissenting juror's questions in the negative, give the entire jury a supplemental charge referring to unanimous verdicts and ignore the issue of "duress." The court's supplemental instruction did what it was calculated to do in a prompt fashion—to pressure and produce a unanimous verdict.

Since *Allen v. United States*, 164 U.S. 492 (1896), this Court has condemned actions of trial courts which have coercive impact on juries. In *Brasfield v. United States*, 272 U.S. 448, 450 (1926), this Court held that a trial court's inquiry into and receipt of information as to the numerical division of a jury during deliberations constituted reversible error.

The Eleventh Circuit's opinion distinguished *Brasfield* by the fact that there was no solicitation by the trial judge as to the jury's division. However, the potential for coercion is not lessened by the fact that a court, itself,

does not solicit information on the numerical division of a jury. Any action or instruction by a court following its receipt of advice on numerical division "inherently [conveys] to the jury that the revelation of their division prompted the giving of the subsequent verdict-urging instruction and that it is, therefore, directed toward the minority jurors." *Cornell v. Iowa*, 628 F.2d 1044, 1048, n.2 (8th Cir. 1980). The Eighth Circuit has also applied the *Cornell* rationale in *Holt v. Wyrick*, 649 F.2d 543 (8th Cir. 1981), a habeas corpus review, where the court approved a state court's granting of a mistrial after the trial judge had received unsolicited information as to the number of jurors who favored conviction. The court in *Holt* realized that after receiving such information, any type of verdict-urging instruction would be naturally construed as benefiting the majority and coercing the minority to agree with them. *Id.* at 551.

In the instant case, the trial court was specifically informed of the numerical division of the jury as to guilt and acquittal. The court was further aware that the "minority" consisted of a single dissenting juror who was experiencing some form of duress. The trial court's reaction was to tell the juror, individually, that he would not be replaced and that he did not have to vote with the majority, even under duress. The trial court then immediately provided the entire jury with an instruction encouraging unanimous verdicts. There could be no question in the mind of the jury, particularly the mind of the dissenting juror, that he was the cause and target of that instruction.

The Ninth Circuit Court of Appeals' view of jury coercion is also in conflict with that of the Eleventh Circuit. The premier case of the Ninth Circuit is *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984), where the court

reversed a conviction because it was rendered in a coercive environment. In that case, on the second day of jury deliberations, the jury, without invitation from the court, disclosed that the majority was in favor of conviction but that one member of the jury was voting not-guilty. *Id.* at 531. Over defense objections, the court gave the jury a modified *Allen* charge and the jury returned a verdict of guilty. *Id.*[17] The Ninth Circuit reversed, holding that *Brasfield* should apply even though the numerical division had not been solicited by the court. *Id.* The court found that any type of verdict-urging instruction given in such an atmosphere would be coercive as the minority would naturally believe that the judge was directing the charge to the minority rather than to the entire jury. *Id.*

The rationale of *Sae-Chua* should apply in the instant case. The trial court in *Sae-Chua* was apprised of the precise numerical division of the jury, knew that there was one dissenting juror, and gave a verdict-urging instruction which produced a guilty verdict about four hours later. Here, the trial court knew the numerical split for guilty and acquittal, the identity of the single dissenting juror and gave a verdict-urging instruction which produced a verdict in less than four hours. It was crystal clear to the instant jury and to the dissenting juror that the supplementary instruction was levelled at him. That instruction reminded him that: the "verdict must be unanimous"; that he could decide the case for himself, "but only after an impartial consideration of the evidence in the case with your fellow jurors"; and that he should "not hesitate to re-examine [his] views and change [his] opinion if con-

[17] Approximately four hours of time elapsed between the giving of the instruction and the reading of the verdict in court. *Id.* at 531, n.3.

vinced it is erroneous." (App.57) Thus, the trial court sent an unmistakable message to the dissenting juror that he had brought about the supplemental instruction and that he should question whether his reasonable doubts represented an "honest conviction" as to the weight of the evidence. *Id.* The trial court also sent a message to the remainder of the jury that the court was mindful of its problem and was encouraging this minority of one to consult and agree with them.

In its opinion, the Eleventh Circuit acknowledged cases finding coercion where there had been an unsolicited disclosure of the numerical division of the jury and a subsequent *Allen* charge. (App.20) However, the Court rejected any comparison between an *Allen* charge and the instant supplementary instruction. (App.21-22) The only distinctions noted by the Eleventh Circuit were that the supplemental instruction did not encompass the *Allen* concepts of expense and time consumption of retrial and the admonition that no future jury could better decide the case. (App.21) The view of the Eleventh Circuit is simply mistaken. The dissenting juror stated in his note that he disliked "having to have a hung jury" because he wanted "to avoid another lengthy and expensive trial." (App.58) This underscores the juror's realization of the time and expense of a new trial and it was not necessary to inform him of these factors. Also, he had already been told that he would not be replaced, thus informing him that no other jury would decide the case. Accordingly, when viewed in context, the distinctions noted by the Eleventh Circuit are indefensible.

The Eleventh Circuit's failure to find jury coercion is also at odds with the decisions of other courts which have considered the issue. Recently, the court in *Smith v. United States*, 542 A.2d 823 (D.C. App. 1988), reversed

a conviction on jury coercion grounds. During the jury deliberations in that case, the jury, without any solicitation, disclosed to the court a nine to three division as to guilt and acquittal. *Id.* at 824. In a subsequent note, the jury informed the court that they were voting eleven to one for guilty. *Id.* The trial court then gave them a verdict-urging instruction and the jury returned a guilty verdict. *Id.*

The District of Columbia Appellate Court reversed, stating that "any pressure" by the trial court under these circumstances "will be understood by all jurors to be directed at the minority." *Id.* at 825. In this setting, the court found that "coercion was probable, if not certain." *Id.* at 827.

In a further effort to discount the coercive atmosphere of the instant jury verdict, the Eleventh Circuit stated that the approximate four-hour time lapse between the supplemental instruction and the reading of the verdicts in court was not indicative of coercion. (App.21) In fact, the verdict was obviously reached much sooner since the four hours included waiting time for counsel to be summoned to court. Moreover, this view is in direct conflict with that of the Ninth Circuit in *United States v. Sae-Chua*, *supra*, where a four hour time period elapsed between the supplemental instruction and the verdict. *Id.* at 531, n. 3.

Finally, the Eleventh Circuit considered it clear from the record that the "duress" experienced by the dissenting juror arose from the normal deliberative process as opposed to extraneous prejudicial information. (App.22) The trial court could have resolved the question by inquiring of the juror as to the general nature of the "duress" without any violation of jury secrecy, as re-

quested by the defense. Instead, the Eleventh Circuit assumed that there was no prejudice because the "duress" occurred during deliberations. This assumption is speculative and ignores the type of duress that actually occurred in the first trial of these defendants which resulted in a mistrial when one juror, during deliberations, shared with the other jurors a media account about the history of the case. (R.9-1483) In any event, the dissenting juror's expression of duress, which was ignored by the trial court, exacerbated the coercive atmosphere in which the verdict was rendered and places this case in even greater conflict with the other Circuits which have found coercion in situations where no "duress" was even expressed.

IV.

THE ELEVENTH CIRCUIT'S DECISION ON JURY COERCION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH WAS, IN PART, ADDRESSED IN *LOWENFIELD v. PHELPS*, ___ U.S. ___, 108 S.Ct. 546 (1988), AND WHICH SHOULD BE SETTLED BY THE SUPREME COURT.

In *Lowenfield v. Phelps*, ___ U.S. ___, 108 S.Ct. 546 (1988), this Court reviewed the sentencing deliberations of a jury in a state murder case. During the deliberations the jury informed the trial court of its inability to reach a verdict. *Id.* at 549. The court polled the jury as to the usefulness of further deliberations. *Id.* Eleven of the jurors responded in the affirmative and one in the negative. *Id.* The court then reread an instruction to the jury with the consent of the defense and at no time did the defense object to the polling of the jury or to the supplemental instruction. *Id.* Thirty minutes after the supplemental instruction, a verdict was rendered sentencing the petitioner to death. *Id.*

Federal review was sought on the issue of jury coercion. The district court denied relief. The Fifth Circuit affirmed as did this Court in a narrow holding:

> We hold that on these facts the combination of the polling of the jury and the supplemental instruction was not "coercive" in such a way as to deny petitioner any constitutional right. By so holding we do not mean to be understood as saying other combinations of supplemental charges and polling might not require a different conclusion. Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body. For the reasons stated, we hold there was no coercion here.

Id. at 552.

In support of its decision, the Court found that the prohibitions of *Brasfield* did not apply to the facts of the case.

> Here the inquiry as to the numerical division of the jury was not as to how they stood on the merits of the verdict, but how they stood on the question of whether further deliberations might assist them in returning a verdict. There is no reason why those who may have been in the minority on the merits would necessarily conclude that further deliberation would not be helpful, or that those in the majority would necessarily conclude otherwise. *Id.*

This Court in *Lowenfield* did not ignore the lack of objection by the defense to the polls and instructions. While the Court did not suggest that the petitioner had waived the issue, it noted that "such an omission indicates that the potential for coercion argued now was not apparent to one on the spot." *Id.*

The narrow holding in *Lowenfield* makes clear that jury coercion cases should be decided on the particular facts

and circumstances of each case. The disclosure of the vote as to guilt and acquittal in this case is different than the *Lowenfield* revelations as to whether or not further deliberations would be helpful. Also, the agreement of the *Lowenfield* defense and lack of objection is greatly contrasted by the repeated objections and motions for mistrial made here since the coercive impact of the proceedings was indeed apparent to those "on the spot." *Lowenfield* lacked the pressure-packed environment of the instant case wherein a lone juror for acquittal expressed the existence of duress, made a plea for a replacement, and stated that the other votes of guilty were contrary to his conscience and reasonable doubts. The circumstances of this case warrant the "different conclusion" specifically reserved by this Court in *Lowenfield* and Supreme Court review is necessary.

CONCLUSION

For reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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